

BEFORE THE  
POSTAL RATE COMMISSION

RECEIVED  
JUN 18 10 26 AM '99  
POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

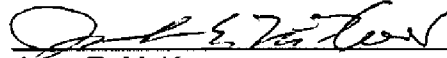
MOTION OF UNITED PARCEL SERVICE FOR  
LEAVE TO FILE REPLY TO UNITED STATES  
POSTAL SERVICE'S COMMENTS WITH  
RESPECT TO PROTECTIVE CONDITIONS  
(June 18, 1999)

United Parcel Service ("UPS") hereby moves that UPS be permitted to file the attached Reply to the United States Postal Service's Response to P.O. Ruling No. C99-1/2 With Respect to Protective Conditions (June 8, 1999). UPS files this motion because the Presiding Officer's ruling did not specifically authorize a reply to those comments, and because UPS believes that its comments on the Postal Service's proposed protective conditions will assist the Presiding Officer in arriving at a fair set of protective conditions for relevant confidential information.

WHEREFORE, United Parcel Service respectfully requests that the Presiding Officer accept for filing the attached Motion of United Parcel Service For Leave to File

Reply to United States Postal Service's Comments With Respect to Protective  
Conditions.

Respectfully submitted,



John E. McKeever  
Kenneth G. Starling  
Nicole P. Kangas  
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.  
3400 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103  
(215) 656-3300

and

1200 19th Street, N.W.  
Washington, DC 20036  
(202) 861-3900

Of Counsel

## COMPLAINT ON POST E.C.S.

REPLY OF UNITED PARCEL SERVICE TO  
RESPONSE OF THE UNITED STATES POSTAL  
SERVICE TO P.O. RULING NO. C99-1/2 WITH  
RESPECT TO PROTECTIVE CONDITIONS  
(June 18, 1999)

For example, the Postal Service suggests that “any discussion of protective conditions is in some sense premature.” Postal Service Response at 1. That is absurd. It is good practice to deal with the question of protective orders early in a proceeding. *Manual for Complex Litigation (Third)*, § 21.431 (1997). Moreover, the question of

protecting confidential information has already been put at issue through the Postal Service's Objection to UPS's Interrogatories UPS/USPS-1 through UPS/USPS-24 (filed May 25, 1999), and UPS's subsequent Motion to Compel (filed June 8, 1999).

More important, the Postal Service seeks to overturn established practice by arguing that discovery of relevant information is somehow the exception rather than the rule, and that relevant information may be withheld even when suitable protective conditions for confidential information are in place. See, e.g., Postal Service Response at 1-2. UPS submits that the Office of the Consumer Advocate ("OCA") has it right, and that the Postal Service has it wrong. As OCA states, "the burden of proof for imposition of protective conditions is on the Postal Service," and "the Commission should presume that unfettered access to requested information is appropriate in all cases." Office of the Consumer Advocate Comments in Response to P.O. Ruling No. C99-1/2 (June 8, 1999) ("OCA Comments") at 3.<sup>1</sup>

In another effort to expedite discovery, UPS submits the following comments on the Postal Service's views concerning appropriate protective conditions.

1. UPS has no objection to the Postal Service's proposed change that would prohibit "not only dissemination of restrictive material, but also revealing its contents."

---

1. The OCA has quite properly suggested that certain of the Postal Service's objections "should be an occasion for the Postal Service and UPS to consult informally to clarify the requests and to reduce burden when possible." OCA Comments at 6. UPS agrees. Accordingly, on June 4, 1999, in an effort to avoid the need to file a motion to compel, counsel for UPS called counsel for the Postal Service to discuss and resolve some of the issues raised by the Postal Service in its Objection to UPS's interrogatories, including in particular the Postal Service's concerns over appropriate protective conditions for confidential information. However, the Postal Service informed UPS that the Postal Service preferred to present its views to the Presiding Officer.

Postal Service Response at 2 n.2. While UPS believes that the suggested change is unnecessary, we have no objection to the Postal Service's suggested clarification, to the extent it may give the Postal Service some comfort.

2. In light of UPS's (reluctant) agreement, *for purposes of this case*, to restrict confidential information to outside counsel and consultants, UPS submits that the vague "involved in competitive decisionmaking" language is both unnecessary and could easily lead to future misunderstandings and disputes. See Docket No. R97-1, Presiding Officer's Notice Concerning Emery's Request for Clarification of Presiding Officer's Ruling No. R97-1/62 (December 3, 1997) ("Presiding Officer's R97-1 Notice") at 2. As we previously pointed out, such a provision is not ordinarily used in complex civil litigation which involves information at least as confidential as that potentially involved here. Comments of United Parcel Service in Response to Presiding Officer's Ruling No. C99-1/2 (June 8, 1999) ("UPS Comments") at 4. Indeed, the sample protective orders approvingly cited by the Postal Service (Postal Service Response at 3-4 n.5, 4 n.6) do not include such language.<sup>2</sup> That is because discovery of "confidential" information generally proceeds on the basis of undertakings by professional representatives of the parties to safeguard, and limit access to, the information. The conditions urged by the Postal Service are excessive by ordinary discovery standards.

---

2. The proposed order in *United States v. Northwest Airlines Corp., et al.*, Civ. Action No. 98-74611 (E.D. Mich.), [www.usdoj.gov/atr/cases/f2300/2353.htm](http://www.usdoj.gov/atr/cases/f2300/2353.htm), limits access to outside counsel who "is not involved in the business operations of the defendants" -- a far different, and far less restrictive, standard than the vague "involved in competitive decisionmaking" proposal.

The privilege that the Postal Service asserts -- commercial sensitivity -- is a qualified one. In determining whether and what protective conditions should be imposed, the Commission must balance the competing considerations: the potential harm to the party asserting the privilege must be weighed against the strong public and private interests in favor of (1) full public disclosure of the bases for agency action, and (2) allowing all parties to have (a) effective assistance of counsel and consultants and (b) access to the evidence needed to prove their cases. See Presiding Officer's Ruling No. R97-1/62 at 8. The conditions requested by the Postal Service tip this balance unfairly in favor of the Postal Service.

The Postal Service urges that access to protected material be limited by making the material available only to individuals who are not "involved in competitive decisionmaking." The Postal Service objects that the protective order proposed by UPS would not confine access to agents of UPS that do not "advise" on competitive matters. United States Postal Service Response to Motion of United Parcel Service for a Protective Order (May 25, 1999) at 4. This formulation is unduly vague and overbroad.

In Docket No. R97-1, the Presiding Officer accepted what was essentially a compromise negotiated by the parties and a third entity that had not intervened in the case. He did not, we submit, intend to preclude any counsel from providing legal advice, for example, so long as counsel does not also actively *participate* in making competitive decisions. UPS submits that no outside legal counsel should be disqualified from having access to relevant material in a case merely because counsel may provide *legal advice* to a client.

Moreover, GAO bid protest proceedings -- the source of the "involved in competitive decisionmaking" language -- are significantly different from other proceedings. In other litigation (as here), confidential information is sought because of its relevance to some issue other than the purpose for which the confidential information is generated. Thus, it is easy for counsel and consultants to preclude an improper use of the information for a different purpose. In the context of a bid protest, on the other hand, the purpose for which the information is sought -- to challenge an award to a successful bidder -- is the same use of the information which gives the information its confidential status.

In any event, there is no support in any of the prevailing standards, whether those used in bid protest cases or those applied in all other contexts, for denying access to protected material solely on the basis of *legal advice* given with respect to any law or regulation where counsel does not actually participate in business decisionmaking. The Postal Service's proposed protective order exceeds the bounds of commonly-adopted protective conditions and ignores the professional duties and sanctions that already apply to counsel for breach of their duties as judicial officers.

3. UPS believes that a "notice and possible objection" procedure (Postal Service Response at 3-4) is unnecessary and would only cause additional delay in making admittedly relevant material available to the parties and to the Commission. The Commission has so far not seen fit to require any such procedure. In fact, that approach was specifically rejected in Docket No. R97-1. Presiding Officer's R97-1 Notice.

4. The Commission also previously rejected a request, made again by the Postal Service here (Postal Service Response at 4), that persons to receive access to protected material disclose clients for whom they have worked in the past. Presiding Officer's Ruling No. R97-1/62 at 12-13. The identity of *past* clients has no bearing on the likelihood that an individual will violate a protective order by making *future* disclosures of protected material. It serves only to invade other legitimately confidential information. Indeed, especially with respect to work done for "what conceivably could be" other interested parties, Postal Service Response at 4, it is the very type of "fishing expedition" for irrelevant information not normally disclosed to the public which the Postal Service says it is attempting to avoid. *Id.* at 5.

5. The Postal Service's proposal (Response at 5) that materials subject to protective conditions may be viewed only on the Commission's premises is not only unprecedented, but it is also insulting (as are many of the Postal Service's other suggestions, including its suggestion at page 4 of its Response that there is a need for the protective conditions to list possible sanctions for violation). What happens, for example, if several parties to the proceeding -- and there are a number of parties in this proceeding, all of whom are entitled to full discovery -- who wish to view the material at



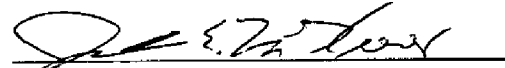
the same time?<sup>3</sup> Again, the Postal Service's purpose can only be to delay timely access to relevant information or to punish (or at least severely inconvenience) those who would dare to file a complaint against it.

The Postal Service has not made any showing that even one piece of confidential information has ever been disclosed in violation of the protective conditions that have been used by the Commission for more than 25 years. See Presiding Officer's R97-1 Notice at 2. Counsel's willingness to accommodate the Postal Service in Docket No. R97-1 and to avoid imposing on the Presiding Officer the need to make a ruling that was unnecessary in the circumstances of that case should not be used as a precedent that stands on its head the normal principle "that unfettered access to requested information is appropriate in all cases." OCA Response at 3.

- 
3. UPS takes strong issue with the repeated assertions that competitors may misuse the complaint process. Indeed, the Postal Service's competitors have filed precious few complaints with the Commission in the almost 30 year history of Section 3662. In this case in particular, UPS has bent over backwards to attempt to accommodate any real or imagined concerns regarding the scope of discovery and access to arguably confidential material, even to the point of agreeing that certain information may be provided subject to protective conditions in the absence of any prior showing by the Postal Service that protective conditions are warranted. That is why any protective conditions should explicitly provide the parties with an opportunity to challenge the classification as confidential of information that is provided under protective conditions.

WHEREFORE, the Presiding Officer should grant the Motion of United Parcel Service for a Protective Order and adopt the protective conditions attached thereto, as modified on the attachment hereto.

Respectfully submitted,



John E. McKeever  
Kenneth G. Starling  
Nicole P. Kangas  
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.  
3400 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103  
(215) 656-3300

and

1200 19th Street, N.W.  
Washington, DC 20036  
(202) 861-3900

Of Counsel

DOCKET NO. C99-1  
STATEMENT OF PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in response to Presiding Officer's Ruling No. C99-1/\_\_. Individuals seeking to obtain access to those materials must agree to comply with these conditions and complete the attached certifications.

1. Only those persons who are either:

(a) employees of the Postal Rate Commission (including the Office of the Consumer Advocate) with a need-to-know; or

(b) a participant's and its counsel in Postal Rate Commission Docket No. C99-1 or a witness or potential witness of ~~such a~~ a participant for purposes related to Docket No. C99-1;

shall be granted access to materials provided in response to P.O. Ruling No. C99-1/\_\_.

2. No person granted access to materials provided in response to P.O.

Ruling No. C99-1/\_\_ is permitted (a) to disseminate those materials in whole or in part, or (b) to reveal the contents of those materials in whole or in part, to any person not authorized to obtain access under these conditions. Counsel may not reveal or in any way use information derived from protected material under this ruling in any other client matters or counseling.

3. The final date of any person's access shall be the earlier of:

(a) the date on which proceedings in Docket No. C99-1 (including final resolution of any appeals) are finally concluded;

(b) the date on which the participant with whom the person is affiliated formally withdraws from Docket No. C99-1; or

(c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C99-1 participant on whose behalf that person obtains access. The participant shall immediately notify the Postal Rate Commission and United States Postal Service counsel in Docket No. C99-1 of the termination of any such business and consulting arrangement or retainer or affiliation which occurs before the final conclusion of the proceeding.

4. Within ten days after the final conclusion of Docket No. C99-1, a participant (and any person working on behalf of that participant) who has obtained a copy of materials provided in response to P.O. Ruling No. C99-1/\_\_\_ shall certify to the Commission:

(a) that the copy was maintained in accordance with these conditions (or others established by the Commission); and

(b) that the copy (and any duplicates) either have been destroyed or returned to the Commission.

5. The duties of any persons obtaining access to materials provided in response to P.O. Ruling No. C99-1/\_\_\_ shall apply to materials disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of a document, as well as to the entire document.

6. All persons who obtain access to materials provided in response to P.O. Ruling No. C99-1/\_\_\_ are required to protect the materials by using the same degree of

care, but no less than a reasonable degree of care, to prevent unauthorized disclosure of the materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary materials or trade secrets and other internal, confidential, commercially sensitive, and privileged information.

7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in response to P.O. Ruling C99-1/\_\_\_ in Docket No. C99-1.

8. The duty of nondisclosure of anyone obtaining access to materials provided in response to P.O. Ruling C99-1/\_\_\_ is continuing, terminable only by specific order of the Commission.

9. Any Docket No. C99-1 participant or other person seeking access to materials provided in response to P.O. Ruling C99-1/\_\_\_, by requesting access, consents to these or such other conditions as the Commission may approve.

10. Any party to Docket No. C99-1 may file a motion with the Commission at any time requesting the Commission to determine whether materials supplied pursuant to this protective order are in fact confidential, or should be removed from the conditions imposed by this protective order.

## CERTIFICATION

The undersigned represents that:

Access to materials provided in response to P.O. Ruling No. C99-1/\_\_\_ in Docket No. C99-1 has been authorized by the Commission.

I agree to use the information only for purposes of analyzing matters at issue in Docket No. C99-1.

I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain in strict confidence the materials obtained from the Commission in accordance with all of the protective conditions set out above.

Name	_____
Firm	_____
Title	_____
Representing	_____
Signature	_____
Date	_____

CERTIFICATION UPON DESTRUCTION OR  
RETURN OF PROTECTED MATERIALS

Pursuant to the Certification which I previously filed with the Commission with respect to information received in accordance with Presiding Officer's Ruling No. C99-1/\_\_\_, on behalf of myself and the party which I represent (as indicated below), I affirm as follows:

1. I have remained eligible to receive access to materials under paragraph 1 of the protective conditions throughout the period those materials have been in my possession. Further, I have complied with all conditions and have maintained in strict confidence the materials obtained from the Commission in accordance with all of the protective conditions set out above.

2. I have used the information only for purposes of analyzing matters at issue in Docket No. C99-1.

3. I have destroyed the information or returned it to the Postal Rate Commission.

4. I have surrendered to the Postal Rate Commission or destroyed all copies of the information which I obtained or which have been made from that information.

Name \_\_\_\_\_

Firm \_\_\_\_\_

Title \_\_\_\_\_

Representing \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing document on all parties to this proceeding by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.

Nicole P. Kangas  
Nicole P. Kangas

Dated: June 18, 1999  
Philadelphia, PA